No. 80-1426

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IN THE

Supreme Court of the United States

ZEIGLER COAL COMPANY, an Illinois Corporation,
Petitioner,

vs.

PHILLIP A. DETHLOFF and DOROTHY J. DETHLOFF,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has *certiorari* jurisdiction where a due process contention was never raised or decided by the state courts.

II. Whether a due process claim made for the first time on a Petition for Rehearing from a state court judgment presents a due process question—where the Petition for Rehearing was summarily denied without even a mention of the due process contention.

III. Whether this Court will exercise *certiorari* jurisdiction to review a state court decision involving only economic matters.

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REASONS WHY THE WRIT SHOULD BE DENIED

I

PETITIONER'S DUE PROCESS ARGUMENTS WERE NOT TIMELY RAISED IN THE STATE COURT PROCEEDINGS AND WERE NEVER DECIDED BY THE STATE COURTS. THEY THEREFORE CANNOT NOW BE REVIEWED BY THIS COURT UNDER ITS CERTIORARI JURISDICTION.

Petitioner, Zeigler Coal Company, has no just basis for asking this Court to exercise *certiorari* jurisdiction. Its due process contentions surfaced for the first time in a Petition for Rehearing filed in the Illinois Supreme Court. Zeigler did not raise them in the trial court. It did not raise them in the Illinois Appellate Court. Nor were they briefed or argued by Zeigler in the Illinois Supreme Court; only in its Petition for Rehearing from the adverse final judgment of that Court did Zeigler first spring a due process argument. Since Zeigler had more than

ample prior opportunity to obtain a ruling on its alleged due process questions but failed to even raise them prior to the decision of the Illinois Supreme Court, Zeigler has waived its due process challenge under Illinois law. *Clore* v. *Fredman,* 59 Ill. 2d 20, 319 N. E. 2d 18 (1974); *Flynn* v. *Vancil,* 41 Ill. 2d 236, 242 N. E. 2d 237 (1968); *Hillblom* v. *Ivancsits,* 76 Ill. App. 3d 306, 395 N. E. 2d 119 (1979).

The long established and unquestioned rule is that this Court has no jurisdiction to review a federal question unless it was both raised *and decided* in the state courts. *Crowell* v. *Randall,* 35 U. S. (10 Pet.) 368, 391 (1836); *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969). Here, not only did petitioner not raise its due process arguments in the state courts, but as the opinions of those courts demonstrate, the state courts did not decide or even address those issues.

Zeigler, therefore, is barred from raising these claims in this Court. *Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935); *Beaty* v. *Richardson,* 276 U. S. 599 (1928).

Additionally, raising a federal question for the first time in a Petition for Rehearing, as petitioner has attempted to do here, is insufficient for federal jurisdictional purposes. The only time this may not hold true is where the highest state court has actually entertained the petition and expressly passed on the federal question. *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128 (1945); *Hanson* v. *Denckla,* 357 U. S. 235, 243-244 (1958); *Herndon* v. *George,* 295 U. S. 441, 443 (1935). This possible exception is not satisfied, however, by the state court entering a one sentence Order simply denying the Petition for Rehearing—as is the case here. The Order must show more. It must demonstrate that the Court considered the federal question, and denied a rehearing, notwithstanding. *Forbes* v. *State Council,* 216 U. S. 396, 399 (1910); *McCorquodale* v. *Texas* 211 U. S. 432, 436-437 (1908).

Furthermore, this is not a case where Petitioner can claim "surprise." The due process issues Zeigler is now claiming did

not originate in the Illinois Supreme court's decision. Petitioner could have presented the same arguments: (1) when the trial court ruled as a matter of law that it had not acted in good faith when it trespassed; (2) when it appealed to the Illinois Appellate Court; or (3) in its appeal to the Illinois Supreme Court. At no stage in the proceedings did it do so.

But even if a federal question had been raised by Zeigler and decided at the highest state court level—a fact not present here—this Court will not review a state court judgment based upon an independent nonfederal or state ground. *Murdock* v. *Memphis,* 87 U. S. (20 Wall.) 590, 636 (1874); *Berea College* v. *Kentucky,* 211, U. S. 45, 53 (1908); *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126 (1944).

For these reasons, the Petition for Writ of Certiorari must be denied.

II.

PETITIONER'S DUE PROCESS CLAIMS ARE NOT SUBSTANTIAL ON THE MERITS

Not only are Petitioner's due process claims not properly presented to this Court for the exercise of its *certiorari* jurisdiction, they are utterly devoid of merit. While not entirely clear, these claims seem to be of two kinds: (1) a procedural due process challenge based on the allegedly retroactive impact of, and absence of notice in connection with, the Illinois Supreme Court's decision in this case; and (2) a substantive due process challenge to the Illinois Supreme Court's announced rule as to punitive damages for bad faith trespass to mineral lands.

A.

Zeigler's procedural due process challenge is built on a foundation of wet clay. Petitioner, joined by its *Amici Curiae,* argues that the Illinois Supreme Court's measure of damage

rule creates a new and previously unannounced rule of conduct, constituting summary punishment. Nothing could be farther from the truth. In the first place, the Illinois Supreme Court did not announce a new rule of punitive damage for wilful trespass to mineral lands—nor did the Court hold that plaintiffs had a right to any such damage. On the contrary, the Illinois Supreme Court specifically stated:

> Turning to a contention of the plaintiffs, we hold that the trial court was correct in *denying their claim that punitive damages were warranted.* As we have observed above, the harsh rule on damages applicable to wilful trespasser and converter of coal is by its very nature punitive. The plaintiffs were awarded damages far beyond what they would have received through royalty payments, and the defendant should not be liable for what would be in effect punitive damages upon punitive damages. (Emphasis added) 412 N. E. 2d at p. 536.

While it is true, as the Court said, that damages recoverable for wilful trespass are punitive "in nature", because the trespasser is not allowed to deduct his costs of mining—that is, and has always been, Illinois law.[1] *Robertson* v. *Jones,* 71 Ill. 405 (1874), *Ill. & St. L. RR & Co.* v. *Ogle,* 82 Ill. 627 (1876); *McLean County Coal Co.* v. *Long,* 81 Ill. 359 (1876); *Illinois & St. Louis RR. & Coal Co.* v. *Ogle,* 92 Ill. 353 (1879); *Donovan* v. *Consolidated Coal Co.,* 187 Ill. 28, 58 N. E. 290 (1900); and *McGuire* v. *Boyd Coal & Coke Co.,* 236 Ill. 69, 86 N. E. 174 (1908). Moreover, the Illinois damage rule was approved by the United States Supreme Court more than half a century ago in *Guffy* v. *Smith,* 237, U. S. 101 (1914). *Guffey was* relied upon by the Illinois Supreme Court for its decision in *Lambach* v. *Town of Mason,* 386 Ill. 41, 53 N. E. 2d 601, 608 (1944):

> The distinction between cases where the entry is made and wells are drilled in good faith, and cases where such entry and the drilling of the wells constitute a wilful trespass, is clearly pointed out in *Guffey* v. *Smith,* 237 U. S. 101, 35

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[1] It is also the law of most other jurisdictions. Annot., 7 A. L. R. 908 (1920); Annot., 21 A. L. R. 2d 380 (1952).

> S. Ct. 526, 59 L. Ed. 856. In that case, the court found that the original entry was made in good faith . . . Later he had actual notice of the existence of a prior lease. The court ordered that, . . . [as to] the first wells drilled, the defendant was entitled to be repaid the expenses incurred in drilling the wells and producing the oil. *However, as to the wells drilled after he had actual notice of the prior lease, the court held that he was not entitled to recover such expenses.* 53 N.E. 2d 601 at 608 (emphasis added)

In light of this history—for petitioner and *Amici Curiae* to contend, as they do, that the Illinois Supreme Court announced *for the first time* in this case a rule of punitive damages in cases of wilful trespass to mineral lands which constitutes a "retroactively imposed penal sanction", is a pure distortion of precedents.[2]

Likewise based on fantasy is petitioner's argument that the state courts denied it a meaningful opportunity to raise the question of the proper and valid measure of damages for bad faith trespass. *Zeigler* advanced this contention from the outset—and it was duly considered, duly passed upon and duly rejected—again, not only by the trial court, but by the Illinois Appellate and Supreme Courts.[3]

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[2] None of Petitioner's citations are in point, and it would be an unnecessary imposition on the Court's time for us to engage in a case-by case analysis. Suffice it to say, even the most cursory examination of Petitioner's allegedly supporting authorities show that they deal with cases decided under Article II, § 2 of the Constitution of the United States, which prohibits passage of an ". . . *ex post facto* Law, or Law impairing the Obligation of Contracts. . .," e.g., *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 17 n.13 (1977); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 17 (1976).

[3] The cases cited by petitioner to support its contention that it was denied an opportunity to offer evidence in support of its claim that it committed only a good faith trespass are equally inapplicable. They deal with deprivation of property rights, e.g., right to hearing before service cut off by a utility. *Memphis Light Gas & Water Div.* v. *Craft*, 436 U. S. 1, 16 (1978); right of a prisoner to be heard before disciplinary punishment is meted out to him; *Wolff* v. *McDonnell*, 418 U. S. 539, 557-58 (1974); or right to a hearing prior to assessment of property taxes. *Londoner* v. *Denver*, 210 U. S. 373, 386 (1908).

Nothing bearing even a remote resemblance to a procedural due process violation is presented by the foregoing contentions. *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).[4]

Petitioner's further attempt to twist its wilful trespass into a due process argument by claiming "reliance on counsel", is equally devoid of merit. The Illinois test for wilful trespass is the taking of minerals after *actual notice* of a prior or adverse claim. This has always been the law of Illinois. *Robertson* v. *Jones*, 71 Ill. 405 (1874). *McLean County Coal Co.* v. *Long*, 81 Ill. 359 (1876); *Illinois & St. Louis R.R. & Coal Co.* v. *Ogle*, 91 Ill. 353 (1879); *Bruner* v. *Hicks*, 230 Ill. 536, 82 N. E. 888 (1907); *Donovan* v. *Consolidated Coal & Coke Co.*, 236 Ill. 69, 58 N. E. 290 (1908); *Guffey* v. *Smith*, 237 U. S. 191, 59 L. Ed. 856 (1914); *Lambach* v. *Town of Mason*, 386 Ill. 41, 53 N. E. 2d 601 (1944); *Shell Oil Company* v. *Manley Corp.*, 50 F. Supp. 21 (E. D. Ill. 1942).

Zeigler admitted "actual notice."[5] It was therefore guilty of wilful trespass as a matter of law. *Guffey* v. *Smith, supra; Bruner* v. *Hicks, supra; Lambach* v. *Town of Mason, supra.*

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[4] Petitioner's other cases can fairly be categorized as involving other constitutional guarantees, e.g., state criminal statutes held void for vagueness, e.g., *Bouie* v. *Columbia*, 378 U. S. 347 (1964); *Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109 (1972); *Rose* v. *Locke*, 423 U. S. 48, 50 (1975); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971), and cases cited by Zeigler at pp. 11-13 of its Petition.

[5] Even absent Zeigler's admission, the evidence of "actual notice" to support the Illinois Supreme Court's finding of a wilful trespass is overabundant. The lease expired June 20, 1970. On July 6, 1971, the Dethloffs gave Zeigler notice of the expiration and offered to discuss a new lease. On October 7, 1971, Zeigler acknowledged the communication and agreed to meet. It never did. On October 11, 1971, the Dethloffs again offered in writing to negotiate a new lease. Zeigler did not even respond. On January 6, 1972, the Dethloffs again wrote proposing a new lease. Still no response. On February 16, 1972, plaintiff wrote again and again there was no response. Notwithstanding all these repeated notices and warnings, on March 25, 1976,

(Footnote continued on following page)

B.

Petitioner's substantive due process argument is equally hollow. In effect, petitioner is asking this court to constitutionalize state trespass law and to substitute its judgment for that of state courts in totally economic matters. This Court has repeatedly rejected such attempts before. *Griffin* v. *Breckenridge,* 403 U. S. 88 (1971); *Paul* v. *Davis,* 424 U. S. 693 (1976). As this Court very aptly observed in *Paul* v. *Davis, supra,* the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the states." Any other course would require this Court to second-guess the decisions of state courts in economic matters—which this Court for more than half a century has refused to do. *City of New Orleans* v. *Dukes,* 427 U. S. 297 (1976); *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963); *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421 (1952).

As the Court emphasized in *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423, 425 (1952):

> [We] do not sit as a superlegislature. [The] state legislatures may within extremely broad limits control practices in the business labor field.... [We] leave debateable issues as respects business, economic and social affairs to legislative decision.

This has obviously not been lost on Petitioner, for both *Zeigler* and *Amici Curiae* lean on the importance of coal mining as an energy source to persuade this Court to intervene constitutionally. Petitioner and *Amici Curiae* are in effect asking this Court to do a constitutional about-face and overrule all the economic substantive due process cases decided by the Court in the last forty years.

(Footnote continued from preceding page)

Zeigler, with characteristic arrogance, mailed the Dethloffs a "royalty check" for coal it had surreptitiously mined from their land.

On April 19, 1976, plaintiffs' counsel wrote Zeigler that it was committing conversion, and demanded it to cease and desist. The demand was rejected, and the Dethloffs filed suit. Zeigler still continued mining.

This case offers no reason for doing so.

It should be noted that Petitioner makes no claim that this case deals with a fundamental right or interest. Thus, the constitutional validity of the Illinois rule for measuring damages for bad faith trespass, under the due process clause, must be tested by the *conceivable rational basis standard. Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). By that test, the damage rule here involved very definitely passes constitutional muster. The Illinois Supreme Court from *Robertson* v. *Jones,* 71 Ill. 405 (1874) to *Dethloff* v. *Zeigler,* 82 Ill. 2d 393, 412 N. E. 2d 526, 535 (1980), has consistently recognized that the damages imposed for wilful trespass is designed to discourage such conduct. Otherwise, a wrong-doer, such as *Zeigler* in this case, would have nothing to lose by invading and converting the minerals of other property owners. Therefore, not only is there here present a conceivable rational basis for the challenged measure of damages—but there is a rational basis *in fact.*

Petitioner's due process contentions do not raise a substantial federal question or, for that matter, any federal question at all.

The Petition must be denied.

CONCLUSION

The Petition for Writ of Certiorari is totally devoid of merit. In the first place, Petitioner never raised or obtained a ruling on its due process contentions at the state level, even though the case was before the trial court, the Illinois Appellate Court and the Illinois Supreme Court. Only on Petition for Rehearing did even an inkling of a due process issue surface. The Supreme Court of Illinois, however, did not pass on that contention. It entered a one sentence order simply denying the petition. Zeigler is therefore barred from raising its due process questions now.

On the merits, Petitioner's due process contentions, when stripped of their veneer, are specially contrived to permit an argument for *certiorari* jurisdiction. It is evident that all that is involved and all that was ever involved in this case is the interpretation of a mining lease under Illinois real property law and the application of the established rule of damages for wilful trespass.

This case involves no federal questions whatever.

Respectfully submitted,

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